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§ 239. The rule was laid down in *Wilson* v. *Rastall* (1792), 4 Term Rep. 753, that the privilege was "confined to the cases of counsel, solicitors and attorneys when acting in their respective characters." And in the case of *Fountain* v. *Young* (1807), 6 Esp. 113, it was further declared that the fact that the client supposed a person to whom he confided information to be an attorney, when as a matter of fact he was not, was of no consequence in determining whether the communication should be entitled to the privilege. Similar views have been taken by a majority of the jurisdictions in this country, where the question has been raised. *McLaughlin* v. *Gilmore,* 1 Ill. App. 563; *Holman* v. *Kimball, 22* Vt. 555; *Sample* v. *Frost,* 10 Ia. 266; *State* v. *Burkhardt,* 7 Ohio Dec. 537; *Schubkagel* v. *Dierstein,* 131 Pa. St. 46; *Brayton* v. *Chase,* 3 Wis. 406; *Foster* v. *Hall,* 12 Pick. 89. The court in the case of *McLaughlin* v. *Gilmore,* supra, in holding that the privilege does not extend to communications made to a person practicing before justices of the peace and not admitted to the bar, says, "As the effect of the rule, however, is to suppress the truth, it is to be construed strictly." Such would seem to be the true rule of construction. Extending it further would be to substitute laxity for justice and to pervert the true purpose of the rule, which is "to promote freedom of consultation of legal advisers by clients." WIGMORE ON EVIDENCE, § 2291. A contrary view has, however, been taken by some courts more leniently inclined. In New Hampshire the privilege has been held to extend, "not only to communications made to professional men, but to those made to any other person." (Syllabus.) *Bean* v. *Quimby,* 5 N. H. 94. This ruling, however, is made under a statute, allowing any citizen "of good and reputable character and behavior," to conduct a suit in any court of the state, "whether the person so employed be admitted as an attorney at law or not." Perhaps no further exposition than this statute is needed to explain the ruling. The Supreme Court of Ohio held in *Benedict* v. *State,* 44 Ohio State 679, that, under the peculiar facts of that case, statements made to a person, not admitted to the bar, but who made it his business to practice before justices of the peace, were privileged. The court weakens its position by refusing to lay down any general rule and restricting its decision to the peculiar facts under consideration. The Tennessee court in 1879 took the position taken in the principal case, so that no new rule is established for that state. *Scales* v. *Kelley,* 2 Lea. (Tenn.) 706. The Tennessee decisions are rendered under a statute requiring a license to practice before justices of the peace and the county court, but it is not seen how that statute should militate against the general rule, as above stated.

EVIDENCE—RES GESTAE—SPONTANEOUS EXCLAMATION.—In an action for the death of the plaintiff's husband, negligently run down and killed by the defendant's train, evidence was admitted by the trial court as to what the deceased said when he first recovered consciousness after being struck by the train; *Held,* that such evidence was properly admitted as a part of the *res gestae. Mills* v. *Missouri Pac. Ry. Co.* (1906), — Mo. —, 94 S. W. Rep. 973.

This ruling is undoubtedly correct, but it might lead to some very curious and interesting results. Suppose the period of unconsciousness, instead of

lasting a few minutes or hours, should last for several days or weeks, or even for a longer time. Would the first exclamation of the person injured on returning to consciousness, provided otherwise competent, still be admissible under the rule above invoked? Such apparently should be the holding. In the case of *M. K. & T. Ry. Co.* v. *Moore,* 24 Tex. Civ. App. 489, a person was injured between nine and ten o'clock in the evening and rendered unconscious. Upon regaining consciousness between nine and ten o'clock the next morning he made a statement without solicitation as to how he was injured, and such statement was held a part of the *res gestae.* The court based its ruling on the theory that the statement "was a spontaneous utterance, and excludes the presumption of premeditation or design on his part." The same dictum appears in *Marler* v. *Texas & Pacific R. R. Co.,* 52 La. An. 727. See also *Collins* v. *State,* 46 Neb. 37; *Brownell* v. *Pacific R. R. Co.,* 47 Mo. 239; *The Augusta Factory* v. *Barnes,* 72 Ga. 217; *State* v. *Murphy,* 16 R. I. 528. In the latter case the court says, "the controlling element of admissibility is not the interval of time, but the real and illustrative connection with the thing done, in which the time is a factor." The case of *Insurance Co.* v. *Moseley,* 8 Wall. 397, is also in point, but the doctrines there laid down are rather extreme and have been very severely criticised by courts and text-book writers. GILLETT, INDIRECT AND COLLATERAL EVIDENCE, § 248. The author just referred to sets forth the principle governing facts such as exist in the principal case. § 258. He, however, classifies this principle as an exception to the general rule that the exclamation must be contemporaneous in point of time, or nearly so, with the principal event, and that the only reason for making this exception is that the "hiatus of time" is bridged by the peculiar circumstances. This would seem to be losing sight of the true principle underlying the rule admitting such evidence, which is "the instinctiveness of the act or utterance," the principle rejected by the learned author above referred to. WIGMORE, EVIDENCE, § 1747. The court in the principal case recognizes this principle in these words, speaking of the injured person, "His mind apparently took up the thread of life precisely at the point it was broken, when struck by the locomotive, and the first instinctive and spontaneous inquiry was, 'What hit me?'" But while the evidence in the principal case was undoubtedly correctly admitted, it would seem that the principle invoked to authorize its admission has not been carefully classified and distinguished. The phrase *res gestae* has been very severely criticised as being indefinite and so comprehensive as to obscure rather than to elucidate the principles to which it has been applied. See WIGMORE, EVIDENCE, § 1795; Prof. Jas. B. Thayer, *American Law Rev.,* Vol. 15:5, 81. Mr. Wigmore says, "The phrase *res gestae* is, in the present state of the law, not only entirely useless, but even positively harmful. It is useless because every rule of evidence to which it has ever been applied, exists as a part of some other well established principle and can be explained in the terms of that principle. It is harmful because by its ambiguity it invites the confusion of one rule with another, and thus creates uncertainty as to the limitations of both." Prof. Thayer, in the article above referred to, calls the phrase a

"catch all," and says that its main value is its "convenient obscurity." The evidence admitted in the principal case comes under a well defined exception to the Hearsay Rule, known as the Rule of Spontaneous Exclamations, and no reference need have been made to the *res gestae* doctrine. WIGMORE, EVIDENCE, § 1746.

FRAUDULENT CONVEYANCE—SALES IN BULK—ACCORD AND SATISFACTION.—A party transferred his merchandise, fixtures and business to another, who, being unable to pay the purchase price, transferred them back in bulk in satisfaction of the debt without complying with the statute regulating sales in bulk. *Held,* that a transfer in accord and satisfaction of the transferee's debt was a "sale" within the act and was fraudulent as against his creditors, but that the statute did not apply to fixtures not kept for sale in the usual course of business. *Gallus* v. *Elmer* (1906), — Mass. —, 78 N. E. Rep. 772.

The statute in question reads, "the sale in bulk of any part or the whole of a stock of merchandise otherwise than in the ordinary course of trade, or in the regular and usual prosecution of the seller's business, shall be fraudulent and void as against the creditors of the seller, unless, etc." The defense was based on the ground that this transaction was not a sale within the statute, but was a discharge by way of accord and satisfaction. Strictly speaking, "a sale is a transfer of personal property in consideration of money paid or to be paid," but it is used in a broader sense in the construction of statutes. In *Howard* v. *Harris,* 8 Allen (Mass.) 297, the court said, "In a general and popular sense, the sale of an article signifies the transfer of property from one person to another for a valuable consideration without reference to the particular mode in which the consideration is paid." In the principal case the court was of the opinion that the statute was intended to prevent traders from disposing of their stock of goods in a manner outside of their usual course of business, so that the goods would be taken away from their creditors in general, and therefore the transfer under the circumstances shown in this case was a sale, although made to a creditor. But the statute does not apply to the sale of fixtures not kept for sale in the ordinary course of business. *Albrecht* v. *Cudihee,* 34 Wash. 206, 79 Pac. 628; *Kolander* v. *Dunn* (Minn.), 104 N. W. 371.

GARNISHMENT—FOREIGN JUDGMENT—NECESSITY OF NOTICE.—Plaintiff brought this action to recover wages due from the defendant. The defendant had paid the amount here claimed under garnishment proceedings instituted in a foreign state upon two judgments against the present plaintiff, which had also been rendered in that state. There had been personal service in the first main suits, but the garnishee who is now defendant gave no notice of the garnishment proceedings. *Held,* that, as the plaintiff had been personally served in the suits against him in the foreign state, notice of the garnishment proceedings was not essential to protect the garnishee. *Wright* v. *Southern Ry. Co.* (1906), — N. C. —, 53 S. E. Rep. 831.

This case follows in a modified form the doctrine set forth in the case of *Harris* v. *Balk,* 198 U. S. 215. In that case it was held that the garnishee